California Update

Fox Rothschild LLP
ATTORNEYS AT LAW

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Employee's Class Action Waiver Held Enforceable

In a closely watched case, *Iskanian v. CLS Transportation*, 206 Cal.App.4th 949 (2012), a California Court of Appeal dealt with the trifecta of questions surrounding an employee's waiver of class and representative actions in an arbitration agreement:

1. Is the California Supreme Court's opinion in *Gentry v. Superior Court*, 42 Cal.4th 443 (2007) (barring class waivers) still good law?
2. If so, would representative claims under the Private Attorney General Act survive?
3. Are class action waivers barred by the protection of "concerted activity" in the National Labor Relations Act?

In a victory for employers, the three judge panel answered "no" to all three questions.

For several years, class action waivers were considered unenforceable under *Gentry*, which was based on an earlier California Supreme Court opinion, *Discover Bank v. Superior Court*, that struck down arbitration agreements in consumer contracts as "unconscionable." In April 2011, however, the U.S. Supreme Court overruled *Discover Bank* in its decision *AT&T Mobility v. Concepcion*. The high court held that *Discover Bank* was pre-empted by the Federal Arbitration Act (FAA), which requires that an arbitration agreement must be enforced "according to its terms." In *Iskanian*, the employer argued that *Gentry* was also overruled because it was based entirely on *Discover Bank*. The trial court agreed, and the Court of Appeal affirmed.

Whither Gentry?

The court in *Iskanian* reasoned that one cannot read the words on the pages of the *Concepcion* opinion without seeing the writing on the wall. The U.S. Supreme Court's rejection of California's restrictions on arbitration was so broad that it sweeps away *Gentry*. Whatever state policy reasons "identified in *Gentry* for invalidating certain class action waivers are insufficient to trump the far-reaching effect of the FAA as expressed in *Concepcion*."

An Exception for PAGA?

The plaintiff argued that the class action waiver was invalid with respect to the claims brought pursuant to the Private Attorneys General Act (PAGA). He argued that a PAGA representative action is different than a class action because it protects "public rights," as one divided Court of Appeal opinion, *Brown v. Ralphs Grocery Company*, 197 Cal.App.4th 489 (2011), had previously held. The defense argued that the dissent in *Brown* was the better reasoned approach. The court in *Iskanian* agreed and held that "following *Concepcion*, the public policy reasons underpinning the PAGA do not allow a court to disregard a binding arbitration agreement."

Protected "Concerted Activity"?

The National Labor Relations Board (NLRB), the agency that interprets federal labor law, recently held in a controversial decision that a class action waiver on its face violates an employee's right to engage in "concerted activity" under Section 7 of the National Labor Relations Act (NLRA). The case was *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 6, 2012). The plaintiff in Iskanian urged the court to follow the NLRB and invalidate the class action waiver. The defense countered that there was no evidence in the record of Iskanian engaging in "concerted activity," and that the class action mechanism is in fact the **opposite** of concerted activity because it relieves the class plaintiff of any obligation to consult with other putative members of the class. The court held that the NLRB's interpretation was contrary to *Concepcion* and other U.S. Supreme Court precedent and that in any event the court was not bound by an NLRB decision.

What Now?

The Court of Appeal recently denied rehearing in *Iskanian*, and we expect the plaintiff to appeal the decision to the California Supreme Court. If the state high court takes the case, it could set up a showdown with the U.S. Supreme Court.

In This Issue:

'Tis The Season For Unpaid Internships (Or Not!)

Summer is officially here, with plenty of high school and college students and recent graduates looking for resume-building work experiences. Before you bring on any unpaid interns this summer — beware. There is no California state statute or regulation that expressly exempts persons participating in an internship from the minimum wage and overtime requirements. Whether an intern should be classified as an "employee" is subject to a case by case analysis of the circumstances. The Division of Labor Standards Enforcement's (DLSE) opinion letter on the subject can be found online.

While counterintuitive, interns are not supposed to really be helpful to your business; rather they are supposed to learn from you. As the Department of Labor (DOL) puts it, an employer is not supposed to derive any immediate advantage from the intern, and they cannot displace your regular employees. Also, while California's DLSE still suggests that an intern be part of some accredited school program, that one fact alone is certainly not sufficient to qualify someone for intern status. There has been a recent flurry of lawsuits by interns claiming to be misclassified and seeking unpaid wages, particularly in the entertainment and publishing industries.

By the way, nothing prevents an employer from calling someone an "intern," hiring them for a limited period of time and paying that person minimum wage. In fact, that is often a very viable option.

Bottom line: just because everyone else does it, and has done it for years without getting sued, does not make it okay. It certainly won't protect your company from being the next class action headline.

Legislative Watch

"Unemployed" May Soon Be A Protected Status

In the latest misguided foray into employment law, the California legislature is poised to send a bill to Gov. Brown that prohibits discrimination against a job applicant because he or she is unemployed. The legislation, AB 1450, is supported by unions and the organized plaintiffs' bar. Employer groups have labeled the law a "job killer" and will urge a veto. If enacted, the law could prevent a company from conducting an internal-only search to fill an open position. It could also lead to a litigation nightmare, confirming standing on every unemployed applicant to argue they have been discriminated against.

Agricultural Labor Relations

In California, agricultural workers are covered by the California Agricultural Labor Act that established the Agricultural Labor Relations Board (ALRB). The ALRB was "created in 1975 to ensure peace in the fields of California by guaranteeing justice for all agricultural workers and stability in agricultural labor relations."

The ALRB could previously uphold or set aside a union election, but it did not have the authority to impose sanctions on employers who engaged in misconduct over the election. California Senate Bill 126, which was sponsored by the United Farm Workers Union, sought to remedy this problem. More than 5,000 farm workers, their families and supporters marched for 13 days over 167 miles from Madera in the Central Valley to Sacramento to urge the Governor to sign SB 126. SB 126 was signed into law by Gov. Brown on October 9, 2011.

Under this new law, if the ALRB refuses to certify an election because of employer misconduct that, "in addition to affecting the results of the election, would render slight the chances of a new election reflecting the free and fair choice of employees, the labor organization shall be certified as the exclusive bargaining representative for the bargaining unit." Thus, the employer is compelled to negotiate with that labor organization. In addition to this change, the statute shortens the time frames for challenging election results (by 90 days in some instances), strengthens mandatory mediation requirements and prohibits courts from delaying the implementation through judicial "stays."

In order to avoid making inadvertent mistakes, employers must begin discussions with their supervisors. Some of the topics to discuss include:

- The company's position on unions
- The definition and role of a supervisor
- What a unionized operation means to management, supervisors and employees
- Union dues, fees, fines, assessments, possible strikes and constitutional restrictions
- Why employees want to join unions
- How to see signs of union organizing

- What a supervisor can and cannot say to employees
- Why union authorization cards are significant
- How to enforce no solicitation and no distribution rules
- Maintaining discipline during organizing

The ALRB will be re-energized with the new legislative power granted to it. The unions will certainly take maximum advantage of the new statutory perks by bypassing losing election results and court enforced injunctive remedies. Prevention is the best cure now.

The Long Arm Of California Law: *Lidow v. Superior Court*

Following complaints of accounting irregularities, a Delaware corporation negotiated a separation agreement with its then CEO. The separation agreement did not include a release of liability, but did state that the CEO was resigning "freely and voluntarily ... at the company's request." The CEO then sued in California (where he worked) claiming that he was terminated in retaliation for complaining about overly aggressive tactics used by the investigators hired to look at the accounting problems and conflicts of interest by a law firm representing the company.

The employer prevailed on summary judgment by relying on the *internal affairs doctrine*. Under Delaware law, a CEO serves at the pleasure of the Board of Directors and cannot sue for wrongful termination unless a specific statute authorizes such a claim. The doctrine stems from the premise that it is impractical to have multiple states regulating a corporation's internal affairs.

The employee took a writ and the appellate court, in a decision handed down last month, reversed. While paying lip service to the internal affairs doctrine, the appellate court decided that California had "vital interests" at stake that justified applying California law. The two lessons from this decision are (1) don't assume that California courts won't get involved in an issue just because applicable law or the parties' agreement specifies that another state's law will control; and, on a more practical level (2) a separation agreement that doesn't include a release of claims leaves the employer vulnerable.

Rules For Meal And Rest Breaks Clarified By California Supreme Court

In April, the California Supreme Court issued its long-awaited decision in *Brinker v. Superior Court* (2012) 53 Cal.4th 1004.

The unanimous opinion held that employers need only "provide" a 30-minute, duty free, meal period after five hours of work (and a second after 10 hours) rather than "ensure" that the meal break is taken. Significantly, the court declined to follow the Labor Commissioner's opinion letter on this point. This is very good news for employers. The case dramatically reduces the potential liability for alleged meal period violations and will make it much more difficult to certify class actions in meal period cases. *See, e.g., Benton v. Tanintco*, Los Angeles Superior Court Case Number BC349267.

In a more sobering portion of the *Brinker* opinion, the court held that employers must provide a 10-minute rest period for every four hours of work "or major fraction thereof" (more than two hours). If employers' written policies do not comply with the "major fraction" concept (and many do not) class certification will be proper. This is not good news.

Finally, the court articulated what is likely to become the next battleground in these cases, i.e., whether the employer somehow engages in systematic behavior that discourages the taking of breaks. The court warned that "an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks." The court then went on to cite several cases in which either the tasks assigned to employees, the scheduling practices, or the existence of informal anti-break pressure, interfered with the employee taking their meal break. *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 962-963 (2005) (employer regulated drivers' time by requiring them to track and record road conditions); *Jaimez v. Daiohs USA, Inc.*, 181 Cal.App.4th 1286, 1304-1305 (2010) (common delivery scheduling policy made it difficult for employees to complete their assigned tasks in order to take meal break); *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 638 (S.D. Cal. 2010) (an informal anti-break policy was enforced through ridicule and reprimand). The court stated that employers may not coerce against the

taking of, create incentives to forego, or otherwise encourage the skipping of legally protected meal periods. This language leaves open a lot of possibilities regarding potential employer liability. The court stated, "[w]hat will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of possibilities."

At this time, employers should evaluate their:

- Meal break policies for compliance with the Brinker opinion;
- Timekeeping practices to ensure recording of start and end times of meal breaks; and
- Practices that might discourage or impede the taking of breaks.

Attorneys Fees In Missed Meal And Rest Break Cases?

In a unanimous and surprising decision, the California Supreme Court recently held that neither a plaintiff who prevails on a claim for missed meal or rest periods, nor an employer who successful defends against such a claim, can recover attorney's fees under Labor Code sections 218.5 and 1194. While this is mostly good news for employers, it is doubtful that the decision in *Kirby v. Immoos Fire Protection, Inc.*, Case No. S185827 (Cal. Apr. 30, 2012), will help stem the tide of meal and rest period lawsuits in California.

The plaintiffs in *Kirby* sued their former employer for failing to provide rest breaks in violation of Labor Code section 226.7, among other claims. After the plaintiffs dismissed this claim with prejudice, the employer moved for attorney's fees as the prevailing party under Labor Code section 218.5, which authorizes the award of attorney's fees to a prevailing party "[i]n any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions ... ." A claim for missed rest breaks, the employer argued, is an "action brought for nonpayment of wages," since section 226.7 requires employers to pay the employee "an additional hour of pay at the employees' regular rate of compensation for each work day that the meal or rest period is not provided," and because that hour of compensation has previously been deemed "wages" instead of "penalties" by the California Supreme Court in *Murphy v. Kenneth Cole*, 40 Cal.4th 1094 (2007).

The plaintiffs argued that a claim for missed rest breaks is actually an action for unpaid minimum wage, and that the employer's motion for attorney's fees was therefore barred by Labor Code section 1194, which provides that only prevailing *employees* can recover attorney's fees in an action for unpaid "legal minimum wage or ... legal overtime compensation."

According to the Supreme Court, both sides had it wrong. While the *remedy* for missed breaks is an "additional hour of pay," the "*legal violation* triggering the remedy" is the failure to provide meal or rest breaks, not the failure to pay wages. Therefore, neither Labor Code section 1194 nor section 218.5 authorizes an award of attorney's fees to a party who prevails on a section 226.7 claim for missed rest or meal periods.

This does not necessarily mean that prevailing plaintiffs can *never* recover attorney's fees on a missed meal or rest period claim. The court declined to address whether attorney's fees are recoverable in cases where a meal or rest period claim is asserted along with a claim for unpaid wages or overtime. Plaintiffs' attorneys also will continue trying to recover fees under California Code of Civil Procedure section 1021.5, California's private attorney general statute.

A few more interesting points about this case:

- The *Kirby* court insists this decision is not at odds with *Murphy v. Kenneth Cole,* 40 Cal.4th 1094 (2007), where the court held that the remedy for missed breaks is a "wage" for purposes of determining which statute of limitation applies to section 226.7 claims.
- It will be interesting to see if and how plaintiff's attorneys make use of this bit of *dicta:* "[S]ection 226.7 does not give employers a lawful choice between providing either meal and rest breaks *or* an additional hour of pay ... [A]n employer's provision of an additional hour of pay does not excuse a section 226.7 violation." You would think no one would bother to sue for missed breaks if the additional hour of pay has already been paid, but crazier things have happened.
- The *Kirby* court also noted that "it is up to the legislature to decide whether section 1194's one-way fee shifting provision should be broadened to include section 226.7 [missed meal and rest period] actions." Will the California Legislature accept this invitation?

CAL/OSHA Launches Confined Space Special Emphasis Initiative

Earlier this year, the California Division of Occupational Safety and Health (Cal/OSHA) launched a statewide Confined Space Special Emphasis Initiative to focus attention on preventing worker deaths and injuries in confined spaces. The Initiative is the result of a dramatic increase in deaths, up to seven in 2011, in confined spaces. A confined space is generally defined as one that (1) is large enough and configured so that an employee can bodily enter and perform work; (2) has limited openings for entry and exit; and (3) is not designed for continuous occupancy. Examples of confined spaces include manholes, boilers, vaults and utility tunnels. A Confined Space Hazard Alert is available online to aid in identifying confined spaces and protect workers. Employers are advised to evaluate their properties for confined spaces because they can be certain that any inspection by Cal/OSHA will include a check for confined spaces.

The NLRB'S Most Recent Rules On Social Media Policies

On May 30, 2012, the National Labor Relations Board's (NLRB) Acting General Counsel issued a report, applicable to union and non-union employers alike, intended to clarify the NLRB's position on social media policies. To this end, the General Counsel issued an Operations-Management Memo discussing seven recent cases and providing a sample of a lawful social media policy. Unfortunately, that sample policy appears to be, at least in part, in conflict with the very cases the General Counsel discusses in his report. Nonetheless, the report is useful in its guidance that broadly worded social media policies whose provisions can be interpreted to prohibit employees' Section 7 activity will be found unlawful.

1. A Social Media Policy Prohibiting Disclosure of Confidential Information Must Define its Scope.

The NLRB found a social media policy that generally instructed employees not to "release confidential guest, team member or company information" unlawful because employees would reasonably interpret the provision to prohibit employees from discussing and disclosing their conditions of employees among themselves or with third parties. Similarly, the NLRB found the following provisions overbroad because, without a specific definition of confidential or non-public information, employees could reasonably construe such language as precluding them from discussing the terms and conditions of employment:

- Prohibiting the "share[ing] confidential information" with coworkers unless they needed the information to do the job."
- Prohibiting the posting information regarding the employer that could be deemed "material, non-public information, or confidential or proprietary information."
- Prohibiting the "reveal[ing] any non-public company information on any public site."
- Instructing employees to avoid "harming the image and the integrity of the company" is unlawfully overbroad.

Strangely, the NLRB found unlawful a provision that encouraged employees to be suspicious if asked to reveal confidential information.

2. A Social Media Policy Must Be Specific in the Type of Posts it Seeks to Restrain.

The NLRB found that a policy that instructed employees to be sure their discussions or posts "relating to the employer" are "completely accurate and not misleading and that they do not reveal non-public information on any public site" was unlawful because use of the phrase "completely accurate and not misleading" would reasonably be interpreted to apply to the employer's labor policies and its treatment of employees. Posts and discussions related to Section 7 activity are protected under the NLRA unless the posts are maliciously false.

Similarly, the NLRB found unlawful provisions that did not clarify what image, photos, quotes, personal information or content employees were prohibited from posting. For instance, in one case the NLRB found unlawful a policy that prohibits employees from posting photos, music, videos, and the quotes and personal information of others without obtaining the owner's permission and ensuring that the content can be legally shared and from using the employer's logo and trademarks because employees would construe this provision to prohibit them from using photos and videos of employees engaged in Section 7 activity.

3. A Social Media Policy Must be Specific as to the Quality of Comments it Seeks to Address.

The NLRB found unlawful provisions that instruct employees that "offensive, demeaning, abusive or

inappropriate remarks are as out of place online as they are offline" because the provision could reasonably be read to include protected criticisms of the employer's labor policies or treatment of employees. The NLRB noted that the instruction: "statements that would be inappropriate in the workplace are also inappropriate online" is ambiguous as to its application to Section 7 because it does not specify which communications the employer would deem inappropriate at work. Policies that preclude employees from making "disparaging or defamatory comments" are likewise unlawful because employees would reasonably construe this policy to preclude criticism of the employer's labor policy or treatment of employees.

Perplexingly, the General Counsel found lawful a provision providing that "any harassment, bullying, discrimination or retaliation that would not be permissible in the workplace is not permissible online … ." It is unclear why such a statement would have any different effect on employees' Section 7 activities than would a provision instructing employees not to use offensive, demeaning or inappropriate remarks. It appears to be a distinction without a difference if the workforce is truly as ignorant of their rights as the NLRB seems to believe.

4. Do Not Prohibit the Reporting of "Inappropriate" Activity Without Defining What Constitutes "Inappropriate" Behavior.

The NLRB found unlawful provisions of social media policies that required employees to "report any unusual or inappropriate internal social media activity" or "report any unsolicited or inappropriate electronic communications." In each case, the NLRB concluded that the term "inappropriate activity" and "inappropriate communications" were sufficiently undefined so as to be read to restrain employees exercise of their Section 7 right to communicate with each other and with third parties regarding terms and conditions of employment.

5. A Disclaimer Will Not Cure an Otherwise Unlawful Policy.

Finally, the NLRB noted in a number of the cases that a savings clause cannot cure otherwise unlawful provisions of an employer's social media policy because in the NLRB's view the employees would not understand from the disclaimer that Section 7 activities are permitted.

Recommendations

Employers should carefully craft language that makes clear their social media policy permits Section 7 activity and, to the extent possible, they should include examples of permissible and impermissible conduct on the part of employees so as to clarify and limit the scope of a rule that might otherwise be considered unlawful. To the extent that an employer wants a high degree of certainty that its policy will be found lawful by the NLRB, it should use the sample policy the NLRB has provided in its memo as a template and speak with experienced labor counsel to tailor the policy to the employer's specific needs.

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